



DEPARTMENT OF THE NAVY
OFFICE OF THE ASSISTANT SECRETARY
RESEARCH, DEVELOPMENT AND ACQUISITION
1000 NAVY PENTAGON
WASHINGTON DC 20350-1000

FEB 23 2006


MEMORANDUM FOR DISTRIBUTION

Subj: MODIFICATION OF AUTHORITY TO CARRY OUT CERTAIN PROTOTYPE PROJECTS

Encl: (1) DPAP memorandum dated February 17, 2006
(2) 10 U.S.C. 2371 Note

As explained in the DPAP memo at enclosure (1), Section 823 of the National Defense Authorization Act (NDAA) for FY 2006 amends the other transaction authority granted under Section 845 of the NDAA for FY 1994. A written determination by the Senior Procurement Executive is now required for prototype projects over \$20 Million but not exceeding \$100 Million. For prototype projects over \$100 Million, a written determination from the Under Secretary of Defense for Acquisition, Technology, and Logistics is required along with congressional notification. All such determinations and congressional notifications are to be submitted through DASN(ACQ). For your convenience, a conformed copy of the text of 10 U.S.C. 2371 note is at enclosure (2).

Please contact Katherine Petersen at (703) 614-9641 if there are any questions regarding this memorandum.


M. F. Jaggard
Chief of Staff/Policy
DASN(ACQ)

Distribution:
MARCORSYSCOM (CT)
NAVAIRSYSCOM (2.0)
NAVSEASYSCOM (02)
ONR (02)
SPAWARSYSCOM (02)

Copy to:
DRPM (DCGS-N)
DRPM (ERP)
DRPM (EFV)
(continued next page)

**Subj: MODIFICATION OF AUTHORITY TO CARRY OUT CERTAIN PROTOTYPE
PROJECTS**

Copy to (continued):

DRPM (NMCI)

DRPM (SSP)

PEO (A)

PEO (C4I/SPACE)

PEO (CARRIERS)

PEO (IT)

PEO (IW)

PEO (JSF)

PEO (LMW)

PEO (SHIPS)

PEO (SPACE)

PEO (SUB)

PEO (T)

PEO (W)



ACQUISITION,
TECHNOLOGY
AND LOGISTICS

THE UNDER SECRETARY OF DEFENSE

3010 DEFENSE PENTAGON
WASHINGTON, DC 20301-3010

FEB 17 2006

MEMORANDUM FOR: SEE DISTRIBUTION

SUBJECT: Authority for Use of Other Transactions for Prototype Projects

Section 845(a)(2) of the National Defense Authorization Act for Fiscal Year 1994, Public Law 103-160 (1993), as amended by section 823 of the National Defense Authorization Act for Fiscal Year 2006, Public Law 109-163 (enacted January 6, 2006), imposes a written determination requirement for authority to use other transactions for prototype projects estimated to exceed \$20,000,000. The written determination requirement for authority to use other transactions applies to prototype projects that are directly related to weapons or weapon systems that are proposed to be developed or acquired by the Department of Defense. Section 823 also includes a requirement to notify the Congressional defense committees at least thirty days prior to signing an other transaction agreement for a prototype project that is expected to exceed \$100,000,000. The written determination approval levels for the use of other transactions for prototype projects set forth in section 823 are as follows:

| Estimated Cost | Approval Authority for Military Departments | Approval Authority for Defense Agencies |
|--|--|--|
| | | |
| Over \$20,000,000 up to \$100,000,000 | Senior Procurement Executives | USD(AT&L) |
| | | |
| Over \$100,000,000 | USD(AT&L) | USD(AT&L) |

Requests for determinations to permit the use of another transaction for a prototype project requiring my approval under section 845(a)(2) (as amended), shall be submitted to the Director, Defense Procurement and Acquisition Policy (DPAP), 3060 Defense Pentagon, Room 3E1044, Washington, D.C. 20301-3060. My staff point of contact for this subject is Ms. Susan Pollack, Defense Procurement and Acquisition Policy, 703-697-8336, susan.pollack@osd.mil.


Kenneth J. Krieg



Enclosure (1)

DISTRIBUTION:

**SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
COMMANDERS OF THE COMBATANT COMMANDS
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, PROGRAM ANALYSIS AND EVALUATION
DIRECTOR, NET ASSESSMENT
DIRECTOR, FORCE TRANSFORMATION
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES**

Enclosure (1)

10 U.S.C.2371 note

(a) Authority.—(1) Subject to paragraph (2), the Director of the Defense Advanced Research Projects Agency, the Secretary of a military department, or any other official designated by the Secretary of Defense may, under the authority of section 2371 of title 10, United States Code, carry out prototype projects that are directly relevant to weapons or weapon systems proposed to be acquired or developed by the Department of Defense, or to improvement of weapons or weapon systems in use by the Armed Forces.

(2) The authority of this section—

(A) may be exercised for a prototype project that is expected to cost the Department of Defense in excess of \$20,000,000 but not in excess of \$100,000,000 only upon a written determination by the senior procurement executive for the agency (as designated for the purpose of section 16(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 414(c)) that—

(i) the requirements of subsection (d) will be met; and

(ii) the use of the authority of this section is essential to promoting the success of the prototype project; and

(B) may be exercised for a prototype project that is expected to cost the Department of Defense in excess of \$100,000,000 only if—

(i) the Under Secretary of Defense for Acquisition, Technology, and Logistics determines in writing that—(I) the requirements of subsection (d) will be met; and (II) the use of the authority of this section is essential to meet critical national security objectives; and

(ii) the congressional defense committees are notified in writing at least 30 days before such authority is exercised.

(3) The authority of a senior procurement executive under paragraph (2)(A), and the authority of the Under Secretary of Defense for Acquisition, Technology, and Logistics under paragraph (2)(B), may not be delegated.

(b) Exercise of Authority.—(1) Subsections (e)(1)(B) and (e)(2) of such section 2371 shall not apply to projects carried out under subsection (a).

(2) To the maximum extent practicable, competitive procedures shall be used when entering into agreements to carry out projects under subsection (a).

(c) Comptroller General Review.—(1) Each agreement entered into by an official referred to in subsection (a) to carry out a project under that subsection that provides for payments in a total amount in excess of \$5,000,000 shall include a clause that provides for the Comptroller General, in the discretion of the Comptroller General, to examine the records of any party to the agreement or any entity that participates in the performance of the agreement.

(2) The requirement in paragraph (1) shall not apply with respect to a party or entity, or a subordinate element of a party or entity, that has not entered into any other agreement that provides for audit access by a Government entity in the year prior to the date of the agreement.

(3)(A) The right provided to the Comptroller General in a clause of an agreement under paragraph (1) is limited as provided in subparagraph (B) in the case of a party to the agreement, an entity that participates in the performance of the agreement, or a subordinate element of that party or entity if the only agreements or other transactions that the party, entity, or subordinate element entered into with Government entities in the year prior to the date of that agreement are cooperative agreements or transactions that were entered into under this section or section 2371 of title 10, United States Code.

(B) The only records of a party, other entity, or subordinate element referred to in subparagraph (A) that the Comptroller General may examine in the exercise of the right referred to in that subparagraph are records of the same type as the records that the

Government has had the right to examine under the audit access clauses of the previous agreements or transactions referred to in such subparagraph that were entered into by that particular party, entity, or subordinate element.

(4) The head of the contracting activity that is carrying out the agreement may waive the applicability of the requirement in paragraph (1) to the agreement if the head of the contracting activity determines that it would not be in the public interest to apply the requirement to the agreement. The waiver shall be effective with respect to the agreement only if the head of the contracting activity transmits a notification of the waiver to Congress and the Comptroller General before entering into the agreement. The notification shall include the rationale for the determination.

(5) The Comptroller General may not examine records pursuant to a clause included in an agreement under paragraph (1) more than three years after the final payment is made by the United States under the agreement.

(d) Appropriate Use of Authority.—(1) The Secretary of Defense shall ensure that no official of an agency enters into a transaction (other than a contract, grant, or cooperative agreement) for a prototype project under the authority of this section unless—

(A) there is at least one nontraditional defense contractor participating to a significant extent in the prototype project; or

(B) no nontraditional defense contractor is participating to a significant extent in the prototype project, but at least one of the following circumstances exists:

(i) At least one third of the total cost of the prototype project is to be paid out of funds provided by parties to the transaction other than the Federal Government.

(ii) The senior procurement executive for the agency (as designated for the purposes of section 16(3) of the Office of Federal Procurement Policy Act (41 U.S.C. 414 (3))) determines in writing that exceptional circumstances justify the use of a transaction that provides for innovative business arrangements or structures that would not be feasible or appropriate under a contract.

(2)(A) Except as provided in subparagraph (B), the amounts counted for the purposes of this subsection as being provided, or to be provided, by a party to a transaction with respect to a prototype project that is entered into under this section other than the Federal Government do not include costs that were incurred before the date on which the transaction becomes effective.

(B) Costs that were incurred for a prototype project by a party after the beginning of negotiations resulting in a transaction (other than a contract, grant, or cooperative agreement) with respect to the project before the date on which the transaction becomes effective may be counted for purposes of this subsection as being provided, or to be provided, by the party to the transaction if and to the extent that the official responsible for entering into the transaction determines in writing that—

(i) the party incurred the costs in anticipation of entering into the transaction; and

(ii) it was appropriate for the party to incur the costs before the transaction became effective in order to ensure the successful implementation of the transaction.

(e) Pilot Program for Transition to Follow-on Contracts.—(1) The Secretary of Defense is authorized to carry out a pilot program for follow-on contracting for the production of items or processes under prototype projects carried out under this section.

(2) Under the pilot program—

(A) a qualifying contract for the procurement of such an item or process, or a qualifying subcontract under a contract for the procurement of such an item or process, may be treated as a contract or subcontract, respectively, for the procurement of commercial items, as defined in section 4(12) of the Office of Federal Procurement Policy Act (41 U.S.C. 403 (12)); and

(B) the item or process may be treated as an item or process, respectively, that is developed in part with Federal funds and in part at private expense for the purposes of section 2320 of title 10, United States Code.

Enclosure (2)

(3) For the purposes of the pilot program, a qualifying contract or subcontract is a contract or subcontract, respectively, with a nontraditional defense contractor that—

(A) does not exceed \$50,000,000; and

(B) is either—

(i) a firm, fixed-price contract or subcontract; or

(ii) a fixed-price contract or subcontract with economic price adjustment.

(4) The authority to conduct a pilot program under this subsection shall terminate on September 30, 2008. The termination of the authority shall not affect the validity of contracts or subcontracts that are awarded or modified during the period of the pilot program, without regard to whether the contracts or subcontracts are performed during the period.

(f) Nontraditional Defense Contractor Defined.—In this section, the term 'nontraditional defense contractor' means an entity that has not, for a period of at least one year prior to the date that a transaction (other than a contract, grant, or cooperative agreement) for a prototype project under the authority of this section is entered into, entered into or performed with respect to—

(1) any contract that is subject to full coverage under the cost accounting standards prescribed pursuant to section 26 of the Office of Federal Procurement Policy Act (41 U.S.C. 422) and the regulations implementing such section; or

(2) any other contract in excess of \$500,000 to carry out prototype projects or to perform basic, applied, or advanced research projects for a Federal agency, that is subject to the Federal Acquisition Regulation.

(g) Follow-On Production Contracts.—(1) A transaction entered into under this section for a prototype project that satisfies the conditions set forth in subsection (d)(1)(B)(i) may provide for the award of a follow-on production contract to the participants in the transaction for a specific number of units at specific target prices. The number of units specified in the transaction shall be determined on the basis of a balancing of the level of the investment made in the project by the participants other than the Federal Government with the interest of the Federal Government in having competition among sources in the acquisition of the product or products prototyped under the project.

(2) A follow-on production contract provided for in a transaction under paragraph (1) may be awarded to the participants in the transaction without the use of competitive procedures, notwithstanding the requirements of section 2304 of title 10, United States Code, if—

(A) competitive procedures were used for the selection of parties for participation in the transaction;

(B) the participants in the transaction successfully completed the prototype project provided for in the transaction;

(C) the number of units provided for in the follow-on production contract does not exceed the number of units specified in the transaction for such a follow-on production contract; and

(D) the prices established in the follow-on production contract do not exceed the target prices specified in the transaction for such a follow-on production contract.

(h) Applicability of Procurement Ethics Requirements- An agreement entered into under the authority of this section shall be treated as a Federal agency procurement for the purposes of section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. 423).

(i) Period of Authority.—The authority to carry out projects under subsection (a) shall terminate at the end of September 30, 2008.